Kota Laksamana (Melaka) Sdn Bhd and (b) that the assignor has requested the assignee to provide banking facilities to enable the assignor to perform the said contracts and the assignee has agreed to provide banking facilities in the form of an overdraft facility up to the sum of $2,800,000 with interest at 2½% above the plaintiff's base lending rate, the first defendant duly executed the deeds of assignment providing, inter alia, as follows:

(1) In consideration of the bank advancing to the assignor the principal sum of dollars ringgit two million and eight hundred thousand only ($2,800,000) the assignor assigns to the Bank all moneys interest and right now or hereafter become due and payable to the assignor by Messrs Pembinaan Bandar Melaka Sdn Bhd (Messrs Pembinaan Kota Laksamana (Melaka) Sdn Bhd) under the said contract.

(2) In the event that no moneys or interest is received by the bank under the assignment under cl 1 above, or if the moneys actually received do not fully satisfy the principal sum with interest thereon the whole principal sum and interest or part thereof that remained unpaid shall become due and immediately repayable.

...

(4) The assignor further covenants that any receipt issued by the bank in respect of any payment made by Messrs Pembinaan Bandar Melaka Sdn Bhd (Messrs Pembinaan Kota Laksamana (Melaka) Sdn Bhd) as hereinbefore mentioned shall be a sufficient and valid discharge.

(5) In the event of the bank receiving any moneys in excess of the principal sum and the accrued interest thereon at two and a half per centum above BBMB base lending rate the bank agreed to refund after deducting all the necessary incidental expenses any such excess to the assignor forthwith or as soon as it is practicable.

After the signatures by the parties there were the following indorsements:

(1) We, Messrs Pembinaan Bandar Melaka Sdn Bhd, hereby acknowledge the existence of the assignment agreeing to credit all proceeds of the contract direct into Kejuruteraan Hong Huat Sdn Bhd's account no: 001-18846-86 with you.

Pembinaan Bandar Melaka Sdn Bhd
(Signed)

(2) We, Messrs Pembinaan Kota Laksamana (Melaka) Sdn Bhd, hereby acknowledge the existence of the assignment agreeing to credit all proceeds of the contract direct into Kejuruteraan Hong Huat Sdn Bhd's account no: 001-18846-86 with you.

Pembinaan Kota Laksamana (Melaka) Sdn Bhd
(Signed)

Looking at the whole of the deeds of assignment of 12 October 1983, it was my opinion that the documents were absolute assignments and were not purporting to be by way of charge only within the meaning of s 4(3) of the Civil Law Act. The assignments were absolute in the sense that the assignor intended to transfer to the assignee 'all moneys, interests and rights now or hereafter become due and payable to the assignor'. Even any receipt issued by the bank in respect of any payment would be a sufficient and valid discharge and the debtors in each case have acknowledged the existence of the assignment and agreed to credit all proceeds of the contracts direct into the first defendant's account with the plaintiff. The debtors therefore knew to whom they had to pay their debts.

However, if I was wrong in my opinion that the assignments were absolute, nevertheless, the above-quoted cl 7 of the deeds of assignment gave the plaintiff the right to take legal action at any time against the assignor itself for the recovery of the banking facilities or any part thereof together with interest thereon without having to enforce the securities given under the said loan agreement. In all the circumstances I therefore allowed the appeal against the decision of the learned senior assistant registrar and gave liberty to the plaintiff to sign judgment as prayed for against the first, fourth and fifth defendants.

Order accordingly.

Solicitors: *Razak Ibrahim & Co*; *AK Lee & Co.*

Reported by *Wong Kim Fatt*

Public Bank Bhd v Chan Tak Kow

HIGH COURT (KUANTAN) – ORIGINATING SUMMONS NO 13 OF 1983
LAMIN J
24 JUNE 1988

Civil Procedure – Foreclosure – Order on summons for directions – Application to set aside – Meaning of 'liberty to apply' clause – Reserve price – Whether market value or forced sale value – Meaning of 'subordinate court' – Rules of the High Court 1980, O 31 r 2(4)(c), O 32 r 9, O 56 r 1

Words and Phrases – 'Liberty to apply'

This is an appeal under O 56 r 1 of the Rules of the High Court 1980 against the decision of the senior assistant registrar in respect of an application by the defendant for an order that the senior assistant registrar's order dated 13 July 1986 in summons for directions be set aside. In the order the reserve price was fixed at $216,000 according to the forced sale value of the plaintiff's valuation report. The said order also contained a 'liberty to apply' clause. The appeal was essentially on two points, namely, the reserve price and the interpretation of the 'liberty to apply' clause.

Held, dismissing the appeal:

(1) Prima facie, the words 'liberty to apply' refer to the working out of the actual terms of the order. It should be confined to the problems relating to enforcing or executing the

order, such as difficulty in its enforcement because of the terms of the order later found to be unclear or doubtful when faced with the actual situation on the ground, so that the party which obtained the order may approach the court again for its indulgence to seek clarification.

(2) With regard to the reserve price, s 257(1)(d) of the National Land Code 1965 gives the registrar a discretion in that he needs only to fix an 'estimated' market value. Having considered all the reasons of the case, the court was of the view that the senior assistant registrar had exercised her discretion fairly by accepting the forced sale value.

Cases referred to

1 *Cristel* v *Cristel* [1951] 2 All ER 574 (folld)
2 *Lim Siew Hong* v *Lee Kok Kim* [1970] (unreported) (refd)
3 *Tay Choon & Ors* v *Jeet Kaur* [1972] 1 MLJ 216 (refd)
4 *Janagi* v *Ong Boon Kiat* [1971] 2 MLJ 196 (refd)

Legislation referred to

Courts of Judicature Act 1964 (Act 91) s 32
National Land Code 1965 s 257(1)(d)
Rules of the High Court 1980 O 31 r 2(4)(c), O 32 r 9, O 56 r 1
Subordinate Courts Act 1948 s 3

Bastian Pius Vendargon for the defendant/appellant.
Rajoo Dakshina Moothy for the plaintiff/respondent.

Cur Adv Vult

Lamin J: This is an appeal under O 56 r 1 of the Rules of the High Court 1980 on the decision of the learned senior assistant registrar in respect of an application (encl 25) by the defendant, inter alia, for an order that the senior assistant registrar's order dated 13 July 1986 (encl 23) on summons for directions (encl 14) be set aside. In the order (encl 23) the reserve price was fixed at $216,000 and at the same time the said order was accompanied by a 'liberty to apply' clause. The appeal was essentially on two points, namely, the reserve price and the interpretation of the 'liberty to apply' clause.

If I may deal with the second point first and in this respect the learned counsel for the defendant/appellant maintained that with the 'liberty to apply' clause being made part of the order (encl 23) the said order in so far as the reserve price was concerned would have the effect that it was not final. When the plaintiff (the party who obtained the order) for example could not enforce the sale, the plaintiff could come to the learned senior assistant registrar to vary the price and likewise the defendant is also entitled to approach the senior assistant registrar to vary the said price. This argument could not stand in view of the facts of this case because even at the time of the hearing of this appeal the sale had not taken place. With regard to the actual meaning of 'with liberty to apply', I am inclined to agree with the meaning given in *Word and Phrases Legally Defined*, Vol 3, 2nd Ed, quoting Somervell LJ in *Cristel* v *Cristel*[1] at p 577 and it reads:

> I think, with respect, that Langton J (in *Abbot* v *Abbot* (1931) 47 TLR 207, at p 209), in dealing with these words 'liberty to apply', used language which went beyond what was necessary for the decision of the case. He said: 'The expression 'liberty to apply' means what it says, namely, that leave was reserved to both parties to make any application concerning any part of the order at any subsequent time.' I think that is too wide a statement. Prima facie, the words 'liberty to apply' refer to the working out of the actual terms of the order.

It should be confined to the problems relating to enforcing or executing the order such as, for example, if there is some difficulty in its enforcement because of the terms of the order later found to be unclear or doubtful when faced with the actual situation on the ground, the party which obtained the order may approach the court again for its indulgence to seek clarification.

Regarding the reserve price as ordered by the learned senior assistant registrar, counsel for the defendant/appellant argued that that was a 'forced sale' value and not the market value as required under s 257(1)(d) of the National Land Code 1965. Counsel for the plaintiff/respondent pointed out that the defendant's counsel was present then and he did not submit any valuation report to counter that of the plaintiff's and he ought not to be allowed to re-open the case on the reserve price. Further the valuation report relied upon by the defendant in support of his application in encl 25 now on appeal was prepared on 2 May 1987. Whereas the valuation report submitted by the plaintiff for consideration in making the order of 13 July 1986 was prepared on 1 July 1986 and therefore the plaintiff's valuation report, in the absence of any other report, ought to be treated as being more reliable. Order 31 r 2(4)(c), in my view, gives the court and in this case the senior assistant registrar a wide discretion to decide when 'fixing a *reserve* or *minimum* price'. It may be noted that s 257(1)(d) of the National Land Code requires the registrar of the court to fix a reserve price 'being a price *equal* to the *estimated* market value' of the land. This provision too, as I see it, gives the registrar a discretion in that he needs only fix an 'estimated' market value.

The plaintiff's valuer gave two figures, namely, 'open market value' and 'forced sale value' with the former at $270,000 and the latter at $216,000. Counsel for the plaintiff/respondent explained that 'forced sale value' meant market value under forced condition, ie a condition being influenced by the current economic situation resulting in a tendency in the value of property going on the downward trend. Having considered all the above reasons I was of the view that the senior assistant registrar had exercised her discretion judicially and fairly by accepting the forced sale value. I did not therefore find it necessary to disturb her finding and accordingly I dismissed the appeal with costs. I made no order on encl 30 which was an application for stay of execution on the senior assistant registrar's order.

On 28 March 1988, parties appeared in open court for further argument on application by the learned counsel for the defendant/appellant. The learned counsel essentially urged the court to exercise its revisionary power available under s 32 of the Courts of Judicature Act (Act 91). He cited three cases, namely, *Lim Siew Hong* v *Lee Kok Kim*,[2] *Tay Choon & Ors* v *Jeet Kaur*[3] and *Janagi* v *Ong Boon Kiat*,[4] where the respective High Courts dealt with the decisions of a Sessions Court and two Magistrate's Courts and not the decision of a senior assistant registrar. The question was whether the term 'subordinate court' as defined in the Courts of Judicature Act can also include the registrar sitting in chambers. The definition of 'subordinate court' in the said Act must, in my view, by necessary implication mean any of those established under s 3 of the Subordinate Courts Act 1948 which reads:

> 3.(1) (repealed)
> (2) There shall be established the following subordinate courts for the administration of civil and criminal law:
> (a) Sessions Courts;
> (b) Magistrate's Courts; and
> (c) in West Malaysia only, Penghulu Courts.

Clearly therefore a subordinate court cannot include a registrar or a senior assistant registrar sitting in chambers. The jurisdiction of a registrar sitting in chambers is found in O 32 r 9 of the Rules of the High Court 1980. His decision is appealable to a judge in chambers by way of O 56 r 1. However, nowhere in the Rules is a revisionary power provided for. Perhaps its absence may be easily explained in that to bring a matter on appeal does not require an elaborate procedure unlike that applicable to decisions of a subordinate court proper. Also, an appeal is a rehearing of the whole matter and every aspect of it can be satisfactorily dealt with and disposed of and so was this matter before me. In the circumstances, I confirmed the decision I made earlier.

Order accordingly.

Solicitors: *Vendargon & Partners*; *Peter Lai & Rajoo.*

Reported by *Wong Kim Fatt*

Overseas Investment Pte Ltd v Anthony William O'Brien & Anor

HIGH COURT (KUALA LUMPUR) – APPLICATION FOR EXECUTION NO 443 OF 1985
SHANKAR J
8 JUNE 1988

Civil Procedure – Summary judgment – Execution – Writ of seizure and sale – Household goods seized – Claim by wife of defendant – Interpleader summons – Allegations of claimant not contradicted – Claim of harta sepencarian – Application for stay of execution refused – Appeal – Execution on property of third party – Rules of the High Court 1980, O 17 & O 35

Family Law – Harta sepencarian – Applicability to household goods enjoyed in common by spouses in matrimonial home – Law Reform (Marriage and Divorce) Act 1976, s 76

In this case summary judgment had been obtained by the plaintiff against the defendant for the sum of S$120,689.02. The plaintiff levied execution by way of a writ of seizure and sale and some household goods were seized at the premises alleged to be the residence of the defendant. The wife of the defendant claimed that the goods had been bought jointly and severally by her and her husband but said she was unable to produce receipts immediately. The sheriff took out an interpleader summons. At the hearing the claimant produced some receipts and the matter was adjourned to enable her to produce more receipts. The plaintiff agreed to release 11 items only. At the adjourned hearing the claimant gave oral evidence. The registrar on the material before him dismissed her claim. The goods were subsequently sold. She appealed to the High Court.

Held, allowing the appeal:

(1) Where a case is to be decided on a contest of affidavits, the rule is that material allegations which are not contradicted are deemed to be admitted. The claimant's oral evidence at the hearing that she was the sole owner of the goods was also unchallenged.

(2) The plaintiff in this case had produced no evidence of the defendant's title in the goods.

(3) Where one party gives sworn uncontradicted testimony to prove a fact, that evidence must be accepted because there is nothing in the other end of the scales. The plaintiff had produced no evidence whatsoever.

(4) The doctrine of harta sepencarian applied to all property acquired in the course of a marriage out of the joint resources or the joint efforts of the spouses. In the absence of clear evidence that the property was the sole property of one spouse, both have an equal share.

(5) Where a wife is in possession of chattels in the matrimonial home and she gives sworn testimony that they were hers, an execution creditor cannot be held to have displaced her claim merely by producing evidence that the husband was living in the same home and is in receipt of good income.

(6) This is not just a case of wrongful irregular execution. It was an execution levied by the plaintiff on goods which have been proved to be the property not of the defendant's but a third party against whom the plaintiff has no judgment. Such wrongful seizure is an actionable trespass and the remedy is in damages.